89-1307

No. 89-

UNITED STATES SUPREME COURT

October Term 1989

MR. W FIREWORKS, INC.,

Petitioner,

v.

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the Fair Labor Standards Act's "amusement or recreational establishment" exemption apply to establishments located outside recreational areas and whose primary activity is selling inexpensive goods intended solely for amusement?

II. May the district courts deny leave to amend an answer under Fed.R.Civ. Proc. 15(a) solely on the basis of delay, absent findings of bad faith or prejudice to the opposing party?

PARTIES

The parties to this proceeding are the petitioner (defendant below), Mr. W Fireworks, Inc., a closely held corporation with no parent companies, affiliates or subsidiaries, and respondent (plaintiff below) Elizabeth Dole, Secretary of Labor, United States Department of Labor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Other Authorities:

No. 89-

UNITED STATES SUPREME COURT

October Term 1989

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Petitioner,	)
v.	)
ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Mr. W Fireworks, Inc. ("Mr. W") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on November 16, 1989.

OPINIONS BELOW

The decision of the court of appeals is unreported and appears at pp. A1-A20 in the separate appendix to this petition. The

judgment of the district court is set out at pp. A50-A51. The opinions and orders of the district court are not reported and appear at pp. A21-A49.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1989. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Section 13(a)(3) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(3):

> The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to -
>
> (3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were

not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture;...

Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of

the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

1. Mr. W is a family owned corporation which imports fireworks, primarily from Asia, and sells them in South Texas at roadside stands. Mr. W has been in this business for about 25 years. It constructs wooden fireworks sales stands, rents sites from landowners and provides for electrical service to the stands.

Fireworks may be sold lawfully in Texas only during two short seasons each year: the 13-day period from December 19 through New Years Eve and the 11-day period from June 24 through July 4. Mr. W recruits operators for these stands at the beginning of each season, provides each operator with inventory as needed, and settles financially with each operator at

the end of the season when the unused inventory is returned. The operators are compensated by means of a commission arrangement based on the retail value of the fireworks they sell.

During the selling season, the operators exercise complete control over hiring, firing and supervising their own employees (the majority of whom are family members). The stands operate long hours during these short seasons, with closing times varying between 9 p.m. and 3 a.m.

The fireworks sold at Mr. W's stands are inexpensive, typically selling for 1 cent to 35 cents. Purchasing fireworks often is itself a festive event, and some customers explode their fireworks immediately after buying them, either in front of the stand or across the street. (Rec. Item no. 48, 1985 transcript, pp. 423-25, 513) Peak usage of the fireworks occurs at

midnight on New Years Eve and after dark on July 4th, and peak sales immediately precede these peak usage periods.

2. Respondent, the Secretary of Labor ("Secretary"), brought suit against Mr. W on November 16, 1983 in the Western District of Texas alleging violations of the record keeping, minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended; 29 U.S.C. §§ 201 et seq. ("FLSA"). The basis for jurisdiction in the district court was 29 U.S.C. § 217 and 28 U.S.C. § 1337.

Mr. W denied liability, asserting first, that its stand operators were independent contractors; second, that it was entitled to an "amusement and recreational establishment" exemption under § 13(a)(3) of the FLSA; third, that its stand operators were exempt "outside

salesmen" under § 13(a)(1) of the FLSA; and fourth, that commissions received by its stand operators were sufficient to discharge Mr. W's liability as provided in 29 U.S.C. § 207(i).

The case was tried to the district court without a jury from July 29 through July 31, 1985. On January 29, 1986 the district court decided that the fireworks vendors were independent contractors and thus outside the FLSA's coverage. The Secretary appealed, and the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court, ruling only on the independent contractor issue and remanding questions about other possible exemptions to be addressed first by the district court. Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987). Mr. W's petition for a writ of certiorari on the independent

contractor issue was denied by this Court on November 2, 1987. 484 U.S. 924 (1987).

On remand, the district court decided on July 16, 1987 that Mr. W was not entitled to the "amusement and recreational establishment" exemption (A21-A27).[1] On February 16, 1988 Mr. W moved to amend its answer to assert the defense that its stand operators are exempt as "administrative" employees under § 13(a)(1) of the FLSA. On March 28, 1988 the district court denied that motion (A28). On May 4 and 13, 1988 the case was further tried to the court, and on June 15, 1988 the district court entered its judgment and opinion holding Mr. W liable for minimum wage and overtime compensation of $225,423.61 and imposing injunctive relief requested by the

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[1]The district court also decided that Mr. W was not entitled to the "outside salesmen" exemption (A25). Mr. W did not appeal that decision.

Secretary (A50).

Mr. W appealed the district court's decision, and on November 16, 1989 the court of appeals affirmed the judgment of the district court, holding that Mr. W is not entitled to the "amusement or recreational establishment" exemption because its income derives from the sale of goods and because the fireworks sales were not intended for use in a geographically distinct recreational area. (A5-A10) The court of appeals also held that the district court did not abuse its discretion in holding that "administrative" employee exemption was unavailable to Mr. W because of its delay in seeking to amend its answer to claim this exemption (A10-A12).

REASONS FOR GRANTING THE WRIT

I. THE SCOPE OF THE "AMUSEMENT OR RECREATIONAL ESTABLISHMENT" EXEMPTION PRESENTS AN IMPORTANT UNRESOLVED ISSUE UNDER THE FLSA WHICH THE COURT OF APPEALS IN THIS CASE DECIDED CONTRARY TO THE HISTORY AND POLICY OF THE EXEMPTION.

1. The scope of the "amusement or recreational establishment" exemption is an unresolved issue important to employers and employees and to the administration of the FLSA which "has not been, but should be" resolved by this Court. Supreme Court Rule 10.1(c). It is unclear from the cases construing this exemption whether it may ever apply outside geographically distinct amusement or recreational areas and whether it may ever apply to any business whose income is primarily from the sale of goods. In this regard, it is noteworthy that the Secretary certified to the court of appeals that the important issues of exemptions to the FLSA in this case "are

central to the Secretary's ability to effectively enforce the [FLSA]..." Brief for Secretary, unnumbered first page, (No. 88-5574).[2]

The issue of the meaning and practical reach of the "amusement or recreational establishment" exemption is presented cleanly by this case, for the court of appeals held on the basis of its prior decision in Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1118-20 (5th Cir.), cert. den. 419 U.S. 896 (1974), that Mr. W was not entitled to the § 13(a)(3) exemption because the exemption "was not intended to cover establishments whose sole or primary activity is selling goods" (A7) and because the exemption "was designed solely for those establishments whose sales were intended for consumption in a

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[2]The Secretary does not contest the seasonal nature of Mr. W's business. Brief for Secretary, p. 16.

'geographically delimited recreational area'" (A7). The Fifth Circuit itself recognized many years ago in Brennan v. Texas City Dike & Marina, Inc., supra, that the absence of a unifying priciple makes [FLSA's] exemptions' interpretation a difficult task." 492 F.2d at 1117. The court noted particularly that the definition of an "amusement or recreational establishment" had not been "judicially explored." 492 F.2d at 1118. Little has changed in nearly two decades, except that the need for an authoritative nationwide interpretation of what Congress meant by the term "amusement or recreational establishment" is now heightened as Americans are increasingly concerned with leisure-time activities involving the purchase of goods for their amusement. The decision of the court of appeals, denying the exemption on grounds unsupported by the

FLSA's language, history and policy, thus brings an important issue into clear focus and calls for review of this unresolved point critical to employers and employees alike.

2. The judicial and administrative authority construing § 13(a)(3) reveals a confusing array both of outcomes and of rationales. For example, marinas which sell and service boating and fishing gear have been held non-exempt by the Fifth Circuit where located along a public seashore, Brennan v. Texas City Dike & Marina, Inc., supra, while a similar facility located on the shore of a lake under supervision of the U.S. Corps of Engineers has been held entitled to an exemption. Donovan v. Fairfield Bay Community Club, Inc., 1983 Lab. Cases (CCH) ¶ 34,511 (E.D. Ark.). Similarly, an establishment operating bus tours of a

battlefield and selling tourist goods was deemed entitled to the § 13(a)(3) exemption (subject to the seasonality requirement), Wage-Hour Op. 123, BNA Wage-Hour Manual 91:861 (April 19, 1971), while a similar business which permitted its buses to be used for some non-recreational purposes was deemed not entitled to the same exemption. Webb v. Music City Service, Inc., 85 Lab. Cases (CCH) ¶ 33,738 (Tenn. App. 1978). Likewise, there is no uniformity of result with respect to private country clubs. Compare Brock v. Louvers & Dampers, Inc., 817 F.2d 1255 (6th Cir. 1987) with administrative interpretations collected in Annot., "What Constitutes 'Amusement or Recreational Establishment' Within the Meaning of Seasonal Amusement Exemption from Fair Labor Standards Act," 88 A.L.R. Fed. 880 (1988).

The lack of a coherent common rationale for construing the "amusement or recreational establishment" exemption is the obvious cause of this idiosyncratic welter of results. In the Fifth Circuit an income test is the principal determinant of the exemption's scope. Brennan v. Texas City Dike & Marina, Inc., supra, 492 F.2d at 1119. If an establishment's income results primarily from the sale of goods, the exemption is unavailable unless the goods are inexpensive and their sale and consumption is confined to a supervised, geographically delimited recreational area (A6-A8). Elsewhere, however, availability of the exemption depends on a non-income based characterization of the primary activity of the establishment. See Brock v. Louvers & Dampers, Inc., supra, 817 F.2d

at 1257-59.[3]

So profound is the confusion surrounding interpretation of this exemption that the courts of appeals cannot even agree about whether their focus should be on the nature of the employee's work or on the character of the employer's business. Compare Marshall v. N.H. Jockey Club, Inc., 562 F.2d 1323, 1331, n.4 (1st Cir. 1977) ("The § 13(a)(3) exemption turns on the nature of the employer's business, not on the nature of the employee's work.") with Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18, 19 (5th Cir. 1973) ("It is the character of the work, not the source of the remuneration, that controls.... The exemption is not a subsidy accorded to an

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[3]A state court in the Sixth Circuit, however, has refused to follow the primary activity test by denying the exemption where an establishment engaged in some modest non-recreational activity. Webb v. Music City Service, Inc., supra, p. 14.

employer because of his principal activities.") Until this Court clarifies the meaning and applicability of the "amusement and recreational establishment" exemption, the lack of coherence in the lower courts' approach to the exemption will continue to engender confusion in the lower courts and uncertainty among employers and employees. Review should, therefore, be granted in order to establish uniformity in construing this exemption.

3. The Fifth Circuit's decision also betrays a distinct misunderstanding of or inattention to § 13(a)(3)'s history in determining its reach. The court of appeals' income test, which regards the sale of goods as a bar to the exemption, is apparently based on the 1961 antecedent of § 13(a)(3). The original version of this subsection was enacted in 1961 as part of the "retail or service establishment"

exemption which is based on income from the sale of goods. The purpose of the 1961 provision was to exempt local establishments with minimal sales income on the theory that they did not sufficiently affect interstate commerce to warrant imposition of federal wage and hour requirements. See Brock v. Louvers & Dampers, Inc., supra, 817 F.2d at 1258.

In 1966 the exemption for amusement and recreational establishments was taken out of the retail and service establishment provision and enacted as a separate subsection of § 13 of the FLSA. Pub. L. No. 89-601, Title II, § 201, 80 Stat. 833-838 (1966). This revision was intended "to establish criteria for seasonality, and - by eliminating the 'retail and service' language - to make plain that employees of seasonal amusement or recreational companies generally are exempt." Marshall

v. N.H. Jockey Club, Inc., supra, 562 F.2d at 1329; accord, Brock v. Louvers & Dampers, Inc., supra, 817 F.2d at 1257. Nowhere does this history suggest any intention to make this exemption inapplicable to retail sales businesses simply because the language was moved from the retail exemption to an independent self-sustaining subsection.

The court of appeals' income test, however, disregards this history and confines the exemption within a narrower compass than Congress intended. Because its approach is out of step with the more detailed and persuasive historical evidence found in other decisions, supra, this Court should grant review to bring the meaning of the § 13(a)(3) exemption in line with the original intent of Congress and thereby eliminate another confusing element in the disparate approaches in the lower courts.

4. Finally, the court of appeals' approach to the particular circumstances of this case underscores the special and important reasons for granting review. The lower courts paid no heed whatsoever to the legislative policy underlying the "amusement and recreational establishment" exemption. As the Sixth Circuit described this policy:

> The logical purpose of the provision is to exempt the type of amusement and recreational enterprises... which by their nature, have very sharp peak and slack seasons. These businesses argue that they should not be held to the same wage and hour requirements as permanent, year-round operations. Their particular character may require longer hours and a shorter season, their economic status may make higher wages impractical, or they may offer non-monetary rewards. Congress responded to these concerns by enacting the amusement and recreational exemption. Brock v. Louvers & Dampers, Inc., supra, 817 F.2d at 1259.

Similarly, the Tenth Circuit, in Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285, 288 (10th Cir.) cert. den. 414 U.S. 909

(1973), opined:

> The exemption... was provided... so as to allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the [FLSA].

Despite the evidence in this case that the fireworks sold by Mr. W's vendors were exclusively for the purpose of amusement and recreation, that they were sold only during two short seasonal periods, that the fireworks were principally used by customers on two holidays within the sales periods, that customers often exploded their fireworks either in front of the stand or across the street immediately after buying them, that the fireworks are typically cheap goods selling for less than 35 cents, that the sale of fireworks is in itself often a festive event, that long hours and family labor are typical of how these stands operate, and that application of federal wage and hour requirements would

be impractical for a 24-day per year amusement business, the Fifth Circuit construed the exemption without regard to its common sense legislative purpose. The lower courts' departure from the Congressional intent to exempt precisely this type of seasonal, amusement-oriented small business from rules applicable to ordinary year-round commercial establishments should be corrected, lest the exemption be confined solely to designated amusement parks, commercial sporting events and the like.

* * *

No apparent purpose would be served by permitting the lower courts to continue feeling their way toward decisions involving this exemption, while complaining about the lack of unifying principles and the difficulty in construing the statute. Moreover, it would be a sad irony, as well

as an unwarranted statutory construction, if roadside fireworks stands selling items for celebrating July 4th and New Years Day - establishments whose character is inherently one of amusement or recreation - are not regarded as "amusement or recreational establishments." The issue as to scope of this exemption is "beyond the academic or episodic" Rice v. Sioux City Mem. Park Cemetery, 349 U.S. 70, 74 (1955), and the time is ripe to review it.

II. REVIEW SHOULD BE GRANTED TO CLARIFY THE EXTENT TO WHICH MERE DELAY, UNACCOMPANIED BY FINDINGS OF PREJUDICE OR BAD FAITH, SHOULD AFFECT A DISTRICT COURT'S DECISION UNDER FED.R.CIV.PROC. 15(a) AND FOMAN v. DAVIS, 371 U.S. 178 (1962).

1. This Court ruled in Foman v. Davis, 371 U.S. 178, 9 L.Ed.2d 222, 83 S.Ct. 227 (1962) that the mandate of Rule 15(a) that leave to amend a pleading "shall be freely given when justice so requires"

is to be heeded. 371 U.S. at 182. Acknowledging that the grant or denial of leave to amend is a matter of "discretion," this Court ruled that an "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Ibid.

2. The decision of the court of appeals in this case leaves its affirmance of the district court's decision unexplained except for the ipse dixit that "justice does not so require" that leave to amend be granted in this case (A11-A12). The district court's rationale is neither more discernible nor defensible. Its reason for refusing to permit Mr. W to raise the "administrative" exemption is that the amendment would be "untimely" and that it could have been presented earlier

(A29). Although the district court mentioned that discovery had been completed, there is no finding either by the district court or by the court of appeals that any further discovery would be required (or if so, that it would delay the trial), that any delay was undue, that Mr. W had acted in bad faith or pursuant to a dilatory motive, that the Secretary would suffer any undue prejudice or that the amendment would be futile - all factors which, if true, might have supported the lower courts' exercise of discretion. Instead, the courts below relied solely on their claimed power to choose to deny leave to amend because of some delay.

The absence of a recognized justifiable reason for precluding Mr. W from asserting a statutory defense is contrary to the language and spirit of Rule 15, contrary to Foman v. Davis, supra, and

contrary to the purpose of the Federal Rules of Civil Procedure that actions will be determined on their merits and not on procedural technicalities.

To the extent that the decisions of the court of appeals and the district court can be read to mean that delay itself is the reason for denying leave to amend, that construction of Rule 15 is in conflict with the approach taken by at least three other circuits in which delay without prejudice or harassment is not a permissible reason to deny leave to amend a pleading. Farkas v. Texas Instruments, 429 F.2d 849 (1st Cir. 1970); Tefft v. Seward, 689 F.2d 637 (6th Cir. 1982); Boileau v. Bethlehem Steel Corp., 730 F.2d 929 (3d Cir. 1984). The Fifth Circuit's marked departure from the justifiably more generous approach of the cases just cited is in itself a reason for this Court to grant review of this issue to

spell out the role which mere delay may play in an application for leave to amend a pleading.

More fundamentally, however, the court of appeals has permitted a type of "discretion" not envisioned by Rule 15 and specifically disapproved by this Court in Foman v. Davis, supra. Leaving matters of pleading to a district court's discretion is not an invitation to caprice, but an entrustment to judgment. As this Court has remarked in other circumstances, such discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." U.S. v. Burr, 25 Fed. Cas. 30, 35 (CC Va. 1807)(Marshall, C.J.), quoted in Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).[4]

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[4]Finally, the context in which Mr. W tried to raise the "administrative" exemption is pertinent here. Not until

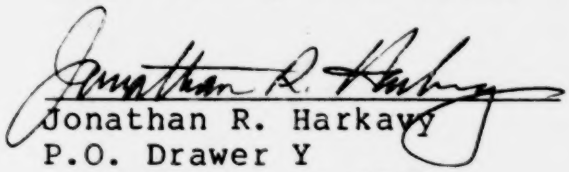
Because the refusal of the courts below to permit Mr. W to raise a statutory affirmative defense is at odds with Rule 15 and this Court's construction of the rule, this case calls for exercise of this Court's supervisory power not only to remedy a manifest injustice, but also to clarify an important aspect of practice in the federal trial courts.

November of 1987, when this Court denied certiorari on the issue of the independent contractor issue, could any "employee"-oriented exemption be applicable. Mr. W's counsel discussed the "administrative" exemption issue with the Secretary's counsel shortly after this Court's denial of certiorari and sought to amend the complaint approximately three months later. This chronology blunts the force of any suggestion by the Secretary or the courts below that Mr. W's delay was "undue."

CONCLUSION

For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals of the Fifth Circuit.

Respectfully submitted,



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APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-5574

ELIZABETH DOLE, Secretary
of Labor, United States
Department of Labor,

Plaintiff-Appellee,

versus

MR. W FIREWORKS, INC.,

Defendant-Appellant.

Appeal from the United States District
Court for the Western District of Texas

(November 16, 1989)

Before GARWOOD, JONES, and SMITH, Circuit Judges.

GARWOOD, Circuit Judge:

This is yet another chapter in the ongoing battle between the Secretary of Labor (Secretary) and Mr. W Fireworks, Inc. (Mr. W) over the application of the Fair

Labor Standards Act, 29 U.S.C. § 201, et seq. (FLSA), to the operators of Mr. W's roadside fireworks stands. The facts and earlier proceedings are set forth in detail in our opinion on the prior appeal in this case, Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir.), cert. denied, 108 S.Ct. 286 (1987). However, a short summary is in order here. Mr. W is a closely held family-owned corporation that owns over one hundred roadside fireworks stands scattered across South Texas. The fireworks business is seasonal by nature, since Texas law permits fireworks sales only during two limited periods around New Year's Day and July 4. In the normal course of its business, Mr. W procures land, checks local fireworks ordinances, conducts market surveys, builds the stands, and transports them to their sites, where most remain throughout the year. It also procures

licenses and insurance, purchases fireworks inventories, pays for electrical service to the stands, places advertisements in newspapers, and recruits operators for the stands.

These operators are the focal point of this ongoing dispute. In November 1983, the Secretary filed suit alleging that Mr. W. had failed to compensate these operators as required by the minimum wage and overtime provisions of the FLSA. Mr. W countered by claiming that the operators were independent contractors, and thus not subject to the FLSA. The district court agreed, finding that the operators were independent contractors. In our prior decision, we reversed and held that the stand operators were employees of Mr. W. Id., 814 F.2d at 1054. However, we remanded the case to the district court for consideration of Mr. W's claim that its

operators/employees were otherwise exempt from the FLSA under the terms of that statute and, if not, for computation of the proper back pay award to those employees. On remand, the district court held that Mr. W was not otherwise exempt from the FLSA and awarded back pay totaling $225,423.61 plus interest. This appeal followed.

Discussion

I. Exemptions to the FLSA

Mr. W contends that its stand operators are exempt from the provisions of the FLSA under the "amusement or recreational establishment" exemption of 29 U.S.C. § 213(a)(3), as well as the "highly compensated administrative employees" exemption set forth in 29 U.S.C. § 213(a)(1). We find no merit in either argument.[1]

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[1]Mr. W also contended that its stand operators were exempt from the FLSA on the basis of the "outside salesmen" exemption

A. Amusement or recreational establishment exemption

Section 213(a)(3) of 29 U.S.C. provides that the minimum wage requirements of the FLSA do not apply to

> "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year ...."

It is undisputed that Mr. W meets the "seasonality" requirement of this subsection. The only remaining question is whether Mr. W qualifies as an "amusement or recreational establishment." Unfortunately, this term is not defined in

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(29 U.S.C. § 213(a)(1)). However, Mr. W has abandoned this argument on appeal.

the statute, and the legislative history is far from clear.[2]

We begin with the well-settled rule that courts should construe exemptions to the FLSA narrowly, and that the employer has the burden of proof to show that it is entitled to the exemption. Arnold v. Ben Kanowsky, Inc., 80 S.Ct. 453, 456-57 (1960). Our review of the record in the instant case convinces us that the district court did not err in determining that Mr. W failed to meet this burden. In our most recent decision concerning the "amusement or recreational establishment" exemption, we held that a marina that derived most of its income from boat, motor, and trailer

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[2]We have previously noted that the task of interpreting the exemptions to the FLSA is made more difficult by the absence of a unifying principle underlying the exemptions, and that the exemptions seem to have been created merely to ensure the FLSA's passage. Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1117 (5th Cir.), cert. denied, 95 S.Ct. 175 (1974).

sales did not qualify. Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1119-20 (5th Cir.), cert. denied, 95 S.Ct. 175 (1974). Although we observed that the legislative history was "skimpy," we held that it did suggest the exemption was not intended to cover establishments whose sole or primary activity is selling goods. Id. at 1118.

Our decision in Texas City Dike also underscored the point that the exemption was designed solely for those establishments whose sales were intended for consumption in a "geographically delimited recreational area," id. at 1119.[3] Of the establishments that have qualified for the exemption (golf course pro shops, baseball parks, amusement parks, racetracks, summer

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[3]The Texas City Dike marina did not service such a limited area, since it catered to boaters and fishermen across a wide area of the Gulf of Mexico. Id. at 1120.

camps, dry goods stores in national parks), each serves a well-defined area. See id. at 1119, nn. 10-14. Although it is possible for consumers to purchase goods at some of these establishments for consumption elsewhere (i.e., golf balls purchased at a pro shop), sale for consumption elsewhere is not the establishment's primary purpose and usually will make up only a small fraction of its business.[4]

In Texas City Dike, we expressed our concern that permitting every seaside merchant to claim the exemption would result in the exemptions swallowing the rule. Id. at 1119. Mr. W concedes that the various other roadside stands common throughout Texas (i.e., purveyors of fruit,

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[4]The prices at these establishments are usually well above the general retail prices for the same item, taking advantage of the consumer's immediate need for the product being sold as well as the absence of an alternative source.

vegetables, seafood, tamales, flags, bird houses, games, toys, portraits of Elvis on black velvet, etc.) are subject to the terms of the FLSA. Although Mr. W's products provide amusement, this fact does not distinguish Mr. W from the retailers of other seasonal and recreational items, such as fishing tackle, shot gun shells, or ski equipment. The district court could legitimately conclude that Mr. W had not shown that it was other than simply a retail merchant selling tangible personal property primarily for use by the purchasers at locations substantially removed from and functionally unrelated to the location of Mr. W's diverse roadside places of business. The Sixth Circuit noted in Homemakers Home & Health Care Services v. Carden, 538 F.2d 98, 101 (6th Cir. 1976), that exemptions to the FLSA are to be "limited to those establishments

plainly and unmistakably within [the FLSA's] terms and spirit" (emphasis added). While we might not put the matter quite so strongly, it is nevertheless clear the exemptions are to be strictly construed, with the burden being on the party asserting an exemption. We conclude that the district court did not err in determining that Mr. W had not established entitlement to exemption as "an amusement or recreational establishment."

B. The administrative personnel exemption

Mr. W's second contention is that its stand operators are exempt under the "highly compensated administrative personnel" exemption of 29 U.S.C. § 213(a)(1). However, the district court, following our earlier remand, ruled against Mr. W on its claims for exemption from the FLSA on July 15, 1987, and Mr. W did not raise its

"administrative personnel" claim until it moved to amend its answer under Fed.R.Civ.P. 15(a) on February 16, 1988, over seven months after the district court's earlier ruling. Mr. W waited even longer (until Jun 1, 1988) to move to amend its answer to conform to the evidence under Fed.R.Civ.P. 15(b), and did so only as an additional effort to claim the "administrative personnel" exemption. The district court denied both motions.

Regarding Mr. W's Rule 15(a) motion, we note that the standard of review for a decision to grant or deny leave to amend is whether the district court abused its discretion. Henderson v. United States Fidelity & Guaranty Co., 620 F.2d 530, 534 (5th Cir.), cert. denied, 101 S.Ct. 608 (1980). We find no abuse of discretion here. Although the language of Rule 15(a) states that leave to amend "shall be freely

given when justice so requires," justice does not so require in the instant case. Mr. W's motion, pared to its fundamentals, is simply an effort to try the matter of exemptions once more, and the district court did not abuse its discretion in refusing this request.

Mr. W's claim under Rule 15(b) is equally meritless. While it is correct in its argument that an issue is treated as if it were raised in the pleadings if the parties consented to try the issue, Metropolitan Life Ins. Co. v. Fugate, 313 F.2d 788, 795 (5th Cir. 1963), there is no indication that the Secretary actually consented to try the issue of "highly compensated personnel" in the present case. The evidence that Mr. W alleges to have shown implied consent was also relevant to the other issues at trial and cannot be used to imply consent to try the present

issue. Jiminez v. Tuna Vessel "Granada," 652 F.2d 415, 421 (5th Cir. 1981). No good cause was established for the distinctly belated raising of the "highly compensated personnel" exemption claim and the district court did not abuse its discretion in denying it.

II. Damages and the "cash advances"

We now address the issue of damages. The district court ordered Mr. W to pay the stand operators the sum of $225,423.61 plus interest as back pay.[5] However, Mr. W contends that it made "cash advances" to

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[5]The Secretary computed the unpaid minimum wages and overtime to total $260,063.69. As requested by Mr. W, the district court deducted $15,889.78 on the basis that the operators owed Mr. W this amount, and also deducted $18,750.30 based on the two year statute of limitations because Mr. W's violations had not been willful (29 U.S.C. § 255 provides a two year statute of limitations for nonwillful violations. See McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677 (1988)). The Secretary challenges neither of these deductions on appeal.

the operators/employees amounting to nearly $160,000, and that the Secretary wrongfully credited it with only half this amount. Mr. W argues that the district court erred in not also deducting this $80,000 (the portion of the $160,000 "cash advances" for which the Secretary did not give credit) from the total back pay award.[6]

It is first necessary to explain the term "cash advances," for in the context of this case it does not refer to advances in the traditional sense of that word, but instead refers to a particular aspect of Mr. W's system for compensating the stand operators. At the beginning of the sales season, each operator receives a quantity of inventory. At the end of the season,

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[6]Mr. W also contended that it was entitled to a deduction of approximately $60,000 as an "exclusion of ten (10) hours as off-duty time." However, the district court rejected this argument and Mr. W does not contest that ruling here.

any remaining unsold inventory is returned to Mr. W. The dollar value of the ending inventory, based upon the suggested retail price, was then subtracted from the dollar value of the total deliveries from Mr. W to that particular stand. This difference is presumed to have been sold by the operator. For instance, if an operator begins with $10,000 worth of fireworks and returns $3,000 worth at the end of the season, that particular stand has presumed sales of $7,000. Mr. W calculates each stand's commission from this figure. In our hypothetical, the operator's commission would equal fifteen percent of the $7,000 presumed sales, or $1,050. However, Mr. W does not simply issue a check for this $1,050. While operators are generally expected to turn over all cash received to Mr. W (which should, in theory, equal the

amount of presumed sales),[7] not all operators do so.[8] For instance, in our example, the operator may turn over only $6,500. The difference between the presumed sales ($7,000) and the amount actually turned over ($6,500) is the amount considered to be the "cash advance." In our illustration, this "cash advance" equals $500. When Mr. W pays the commission due (here, $1,050), it subtracts the "cash advance" from the total commission. Here, Mr. W would pay our hypothetical operator $550 in respect to his commission ($1,050 total commission

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[7]For purposes of this hypothetical, we will ignore state sales taxes.

[8]In fact, some operators took their entire commissions out of the sales receipts before the end of the sales season with the intent that Mr. W. would owe them nothing at the time it paid the final commissions. Mr. W did not object to this practice, as long as the operators did not withdraw funds in excess of their commissions.

less $500 "cash advance").

In making its initial calculations, the Secretary disallowed one-half of each operator's cash advance across the board and without any individualized consideration. The district court accepted the Secretary's figures. However, the evidence in the record indicates that this was clearly erroneous. Many of the operators' "settlement sheets" include notations stating that the operators had taken the entire permitted cash advance for their own use.[9] For instance, of the more than ninety settlement sheets for the 1987 summer season, all but seven contained such notations. Although these notations were apparently prepared by Mr. W, nothing in the record positively states this fact, and

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[9]This notation reads as follows: "[A]mount of advances representing cash which operator acknowledges withdrawing for its own use __[amount filled in]__."

even if they were prepared by Mr. W, the district court made no direct (or even implied) statement that would indicate that these notations lacked credibility. Furthermore, Mr. W also introduced acknowledgements, signed by the operators themselves, that the operators had taken the cash advance money. These acknowledgements said:

> "I, (operator), ran a Mr. W Fireworks, Inc. stand at (location) the season of (season). On my settlement sheet the (amount) of advances reflects (amount) that I took out of the cash receipts for my personal use or labor or expenses."

Although these acknowledgements state that the money was taken for "personal use or labor or expenses," we held in our prior opinion that the expenses in running the stands (i.e., general maintenance, purchase of hay to cover muddy areas in front of the stands, etc.) were indisputably minimal. Id., 814 F.2d at 1048-49. Regarding the

other two allocations (personal use or labor), Mr. W is entitled to credit for both. It is undisputed that Mr. W. is entitled to receive credit for money taken by the operators for their own personal use, and also that Mr. W is entitled to credit for money used by the operators to pay for assistants, because the pay due to these assistants was factored into the Secretary's initial calculations. Because it was error for the district court to simply accept the Secretary's initial figures at face value, given the record evidence, we reverse the back pay award and remand for further proceedings consistent with this opinion.[10]

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[10]On the basis of the evidence adduced at the May 4, 1988 back pay hearing, it appears that the cash advance money may be allocated roughly (and given the general lack of record keeping by both Mr. W and the operators, we stress "roughly") in the following manner:

For the foregoing reasons, the judgment of the district court is

AFFIRMED in part, REVERSED in part, and REMANDED.

Expense	Percent
Personal Use	17
Pay to Assistants	35
Stand Improvements	3
Unspecified	45

While the idea of splitting the advance money fifty-fifty has some appeal, under the record and extant findings this method of division could not properly be applied except possibly to that portion of the advance the use of which was not shown. On the basis of the above percentages, this means that the court should have permitted the Secretary to disallow no more than approximately one-quarter of the total cash advance figure, rather than one-half. However, we do not mandate that the district court rigidly apply these numbers on remand. Since the court made no findings regarding the credibility of the settlement sheet notations or the operators' signed acknowledgements, the amount disallowed may well be less than the one-quarter discussed above.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jul 15 1987
Charles W. Vagner,
Clerk]

WILLIAM E. BROCK, Secretary of Labor, U.S. DEPARTMENT OF LABOR, Plaintiff,	*	SA-83-CA-2548
v.	*	
MR. W FIREWORKS, INC.	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

On January 29, 1986, this Court entered its Judgment in defendant's favor, having found that the operators of defendant's fireworks stands were independent contractors not protected by the provisions of the Fair Labor Standards Act (FLSA). The Fifth Circuit Court of Appeals reversed, concluding that the operators were employees within the meaning of the FLSA. The case was remanded to determine whether defendant was exempt from coverage

under the "amusement or recreational establishment" exemption (29 U.S.C. Section 213(a)(3)) and the "outside salesman" exemption (29 U.S.C. Section 213(a)(1)). The parties were ordered to brief the exemption issue, and inform the Court whether additional evidence needed to be taken. The briefs have been filed and it appears no further hearings are necessary. Having reviewed the arguments, the trial testimony, and the applicable law, the Court is of the opinion defendant is not exempt from compliance with the FLSA.

The employer asserting exemption from the application of the FLSA has the burden of proving entitlement to that exemption. Brennan v. Texas City Dike and Marina, Inc., 492 F.2d 1115, 1117 (5th Cir.), cert. denied, 419 U.S. 896 (1974). An exemption from the FLSA must be narrowly construed and should not be applied unless the

employer plainly and unmistakably fits within its terms and spirit. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945). For the amusement or recreational establishment exemption to apply, the business must be (1) seasonal and (2) recreational. Brennan v. Texas City Dike and Marina, Inc., at 1117. The Secretary of Labor does not dispute that Mr. W Fireworks meets the seasonality requirement. In the Texas City case our Court of Appeals examined the legislative history of Section 213(a)(3) and concluded that the exemption does not cover establishments whose sole or primary activity is selling goods, unless the enterprise is an integral part of a supervised, geographically delimited recreational area or establishment. Id., at 1118. Typical examples of such are the concessionaires at amusement

parks and beaches. 29 C.F.R. Section 779.385.

The facts in this case are clear that defendant's stand operators exclusively engage in the sale of merchandise, primarily fireworks. It is also undisputed that defendant's fireworks' stands are located at various points on the side of a highway and are not part of any larger amusement area. In Texas City the employer had a multifaceted business, providing both goods and services to the public. In that situation the Court of Appeals applied a principal activity test to determine whether the exemption could be applied. Mr. W Fireworks, on the other hand, dealt only in the sale of goods. Since defendant provides no amusement or recreation services, the Court must find that it is not entitled to the Section 213(a)(3) exemption.

Neither can defendant's employees at the fireworks stands qualify as "outside salesmen" under Section 213(a)(1). An "outside salesman" must be engaged in activities away from the employer's place of business. Brennan v. Modern Chevrolet Co., 363 F.Supp. 327, 331 (N.D. Tex. 1973), affirmed, 491 F.2d 1271 (5th Cir. 1974). See, 29 C.F.R. Section 541.500. FLSA regulations, adopted pursuant to an express delegation of authority to the Secretary of Labor by Congress, become, in effect, a part of the statute and have the force and effect of law. Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249, 260 (5th Cir. 1969). Further examination of the applicable regulations is, therefore, instructive. 29 C.F.R. Section 541.502 states that characteristically, an "outside salesman" is one who makes his sales at his customer's place of business. It further

says that any fixed site used by a salesman as a headquarters must be construed as one of his employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

First, it should be noted that the fireworks stands are defendant's property. They are constructed at defendant's expense, and then transported to the site leased by defendant. Second, the stand operators sell all of the fireworks from a fixed site, the stand itself. Finally, none of the operators makes the sales at the customer's home or place of business. The Court concludes that the fireworks stands are defendant's places of business, and that the stand operators are not, therefore, "outside salesmen".

It is therefore, ORDERED that defendant's request for exemption from coverage by the FLSA is OVERRULED.

SIGNED this 15th day of July, 1987.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Mar 28 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor	*	
	*	SA-83-CA-2548
Plaintiff,	*	
vs.	*	
MR. W FIREWORKS, INC.	*	
Defendant.	*	

ORDER

On this day came on to be considered defendant's motion to amend its answer to add another defense, filed February 16, 1988. Judgment for defendant was entered herein on January 29, 1986, and was reversed April 20, 1987. On June 1st, the parties were ordered to brief the applicability of the "amusement or recreational" establishment exemption and the "outside salesman" exemption to the Fair Labor

Standards Act, which were raised in defendant's amended answer prior to the first trial. On July 15th, the Court ruled that neither exemption applied to defendant. Since that time, the parties have been preparing for the damage phase of trial; discovery has been extended and the damages hearing has been set and reset at the parties' request on more than one occasion. In its Order of January 27, 1988, the Court continued the case until May 4th but stated that no further requests for continuance would be entertained.

Defendant's motion to amend its answer to add another defense is untimely. The defense could have been presented either before trial or at the time the other exemptions were addressed on remand. Defendant waited until discovery on the damages phase was completed and the case was set for trial before asking to amend.

The liability phase is over and only damages remain to be determined.

It is, therefore, ORDERED that defendant's motion to amend its answer is DENIED.

SIGNED this 20th day of March, 1988.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jun 14 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor	*	
Plaintiff,	*	SA-83-CA-2548
vs.	*	
MR. W FIREWORKS, INC.	*	
Defendant.	*	

ORDER

On this day, came on to be considered the motion of defendant to amend its answer to conform to the evidence. For reasons previously expressed, the motion shall be DENIED.

It is so ORDERED.

SIGNED this 14th day of June, 1988.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jun 14 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, *
Secretary of Labor, *
United States *
Department of Labor *
* SA-83-CA-2548
Plaintiff, *
vs. *
*
MR. W FIREWORKS, INC. *
*
Defendant. *

MEMORANDUM OPINION

Liability of defendant to pay its employees minimum wage as required by the Fair Labor Standards Act, Title 29 U.S.C. Section 201 et seq., having been established, a hearing to determine the amount of damages was conducted. Having considered the evidence presented at the hearing, as well as the applicable law, the Court now renders its decision.

The following factors, among others, were considered by the Court in determining

the amount of wages owed to defendant's employees in this case. Defendant is in the business of selling fireworks during two separate seasons of the year. The summer season is eleven (11) days long, and the winter season is thirteen (13) days long. The fireworks stands were generally open between 9:00 a.m. and midnight each day of the sale season at the defendant's suggestion. Pursuant to State law and defendant's contractual arrangement with its employees, the stand operators were required to be present at the stands 24 hours a day. Operation of the stands required the labor of the stand operator and others recruited by the operator to assist in firework sales. Stand operators enlisted the aid of relatives and friends to operate the stands. At the larger stands, six (6) or more persons were present each day for various numbers of

hours. Even at the smaller stands, the stand operator was assisted by at least one (1) and often more individuals. During the busiest days of the season, December 24th and 31st and July 3rd and 4th, additional workers were employed. All persons employed by the stand operators were hired at the expense of the stand operators.

Under their contract with defendant, stand operators were to be paid a 15% commission on fireworks sales. However, the amount of money actually received by the operators was often far less than fifteen percent of the sales. The "Commission Agents Settlement Sheet" prepared by defendant shows how defendant computed the commission due to a stand operator. The "Total Charges" at the top of the settlement sheet is the dollar figure representative of the amount of merchandise given to a stand operator for

sales throughout the sales season. The "Closing Inventory" is the dollar figure representative of the amount of merchandise returned to defendant at the end of the sale season by the stand operator. The difference between these figures is reflected in the "Taxable Sales" category. Sales tax is added to that figure. The "Cash Received" from the stand operator is deducted from the total amount to be collected from him or her. Defendant lists this difference as an "Advance." The advance is deducted from the fifteen percent of the taxable sales to give the amount due the stand operator.

Plaintiff has submitted her back wage computation of the amount of standard and overtime wages due from defendant to its employees. Plaintiff calculated back wages based on 172 total operator hours for the winter seasons and 148 operator hours for

the summer seasons. These figures are based on thirteen 12-hour work days for the stand operator in the winter seasons and eleven 12-hour work days for the stand operator in the summer seasons plus two 8-hour days, one to set-up and one to close down the stand. Plaintiff's formula also considers the necessity of hiring at least one additional helper per stand which was paid for by the stand operator; therefore, there are thirteen 4-hour days of helper work for the winter seasons and eleven 4-hour days of helper work for the summer seasons, which amounts must be added to the money due the stand operator for his work.

The evidence supports these figures. Gerard Rodriguez, a stand operator in the summer of 1987, testified that he was at the stand 24 hours a day every day except for a 2 to 3 hour period during which he went to his home. He testified that 3

other persons helped most of the time, at 12 hour shifts. It took 8 to 12 hours for Rodriguez and another individual to set up the stand, and 10 hours for Rodriguez and 2 others to clean up, count the inventory and coupons, take down the stand and return everything to defendant. Ramona Wessels testified that it took 4 to 6 hours for her, her husband and her daughter to set up the stand, and a like amount of time to close the stand. She worked 8 to 10 hours per day and slept in a camper at the stand site. Her husband and daughters worked a combined total of 14 to 17 hours per day, and longer hours on the busier days. Sharon Welch, a stand operator for three seasons, testified that it took 12 hours for 2 persons to set up the stand. She stayed at the stand 24 hours a day and slept in the travel trailer she owned. Her husband was with her every day, as were

four other persons who worked approximately 6 hours each. During the second week of the winter season, more persons were needed to work longer hours. On December 24, 1986, nine people worked 8 hours each, and on December 31, 1986, twenty-two people worked 12 hours each. David Velasquez, an operator in the winter season of 1986-1987, testified that he remained at the stand 24 hours a day but for 1 1/2 to 2 hours to go home for a shower. Several persons worked 4 hours a day during most of the season, and additional persons worked longer hours on Christmas Eve and New Years Eve.

The 4-hour days for helpers can be justified in either one of two ways. If considered in addition to the operator's 12-hour day, a 16-hour day is created. Although the stands were generally open from twelve to fifteen hours per day, the stand operators were obligated by State law

and by defendant to remain at the stand 24 hours per day, and were available to sell fireworks at any time during that 24 hour period. Courts have recognized that "waiting time" may also be "working time" for purposes of the FLSA. Skidmore v. Swift & Company, 323 U.S. 134, 136, 65 S.Ct. 161, 162, 89 L.Ed. 124 (1944). Brock v. El Paso Natural Gas Company, 644 F.Supp. 1202, 1206 (W.D. Tex. 1986). In each case, the Court must resolve the question whether the employee was engaged to wait, or whether he is waiting to be engaged. Skidmore, 323 U.S. at 137, 65 S.Ct. at 163. As in Brock, defendant's employees were restricted in their movements to the extent that they could not leave their assigned station without first making arrangements for a replacement. During these periods of time, the employee is on duty, his duty being to stand and wait. See, Brock, 644

F.Supp. at 1207. When "idle time" is spent predominately for the benefit of the employer, not the employee, such time is compensable under the terms of the FLSA. Ibid. Therefore, the requirement that the stand be manned 24 hours per day justifies payment of wages for a 16-hour day. Additionally, the evidence is overwhelming that more than one helper worked at the stands at the same time as the operator. Even if the stand was operated only 12 hours per day, in almost every case, more than 16 hours of work was performed.

In determining whether the operator was due back wages based on the plaintiff's formula, the amount of money actually received by the operator had to be determined. The amount of money actually received by the operator is referred to as the operator's "net commission." The net commission was determined by subtracting

one-half of the amount of the "advance" from the figure representing the 15% commission on sales found on settlement sheets. Once the operator's net commission was determined, the figure was divided by the applicable number of hours for the season to determine the operator's regular rate of pay. If the regular rate of pay was less than the minimum wage, the operator was due an amount equal to the minimum wage and overtime for all hours worked. If the regular rate of pay was more than the minimum wage, the operator was due overtime compensation at one and one-half times his regular rate of pay. The operator was also due reimbursement for helper pay at the rate computed.

Defendant contends that the full amount of cash advances should have been allowed as credits, instead of only 50%. The Court does not agree. Much of the

evidence concerning these "advances" was conflicting. It is defendant's contention that these "advances" were sums withdrawn by the operators for their personal use. While there is evidence to support this position to an extent as to some operators, more evidence supports the view that the money attributed as an "advance" was either used to pay stand expenses or was otherwise unaccounted for. Gerard Rodriguez testified that any money he withdrew from the fireworks' sales was replaced, and that beer and barbecue were not paid for from the fireworks' money. Ramona Wessels testified that her "advance" represents cash she used to pay employees, for stand expenses, as well as for personal use. Sharon Welch could not explain what her "advance" represented. She testified that the only money she withdrew from the fireworks' sales was for stand expenses

such as hay, butane for her trailer, a portable toilet, and to pay her employees. David Velasquez took money for caulking and plastic to prevent water from leaking into the stand. He also purchased hay and food. He also testified that he believed he was made to pa for fireworks damaged by water leaks. Other witnesses also testified that money was withdrawn to pay employees, for stand expenses and for personal expenses. Most operators testified that there were no thefts or inventory discrepancies.

The Court believes the evidence justifies deduction of one-half of the amount of the "advance." When an employer has failed to maintain the payroll records required by the FLSA, the employees' initial burden is to make out a prima facie case that the FLSA has been violated and to produce some evidence to show the amount and extent of the violation. Beliz v. W.

H. McLeod & Sons Packing Company, 765 F.2d 1317, 1330 (5th Cir. 1985). An employee has carried his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 687-688, 66 S.Ct. 1187, 1192-1193, 90 L.Ed. 1515 (1946). The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. Ibid. If the employer fails to produce such evidence, the Court may then award damages to the employee, even though the result be only approximate. Ibid. Beliz, 765 F.2d at 1330-1331. This Court believes that

plaintiff has satisfied her burden. It thus becomes defendant's responsibility to produce evidence which would negate the reasonableness of the inference to be drawn from the plaintiff's evidence. Defendant has not done so. The evidence in some situations would justify deduction of the entire amount of the "advance" as an improper charge against the stand operators. Plaintiff's formula, deducting only one-half of the "advance" is reasonable.

According to plaintiff's computations, the total amount of unpaid minimum wages and overtime compensation amounts to $260,063.69. Defendant contends that several figures must be deducted from this amount. Defendant asserts that approximately $80,000 which represents one-half of the cash advances disallowed by plaintiff in its computations, must be subtracted. It also argues that approximately $60,000,

which represents an exclusion of ten (10) hours as off-duty time, must be deducted. The Court has previously addressed the issues of advances and off-duty time, and these objections are overruled. Defendant also contends it is entitled to credit for $3,784.84, representing imputed wages claimed for operators who owed defendant money at the end of the season, $2,675.72, representing portable toilet and trash collection charges already considered by defendant, and $9,429.22, representing clerical errors. The objections shall be sustained and these amounts, totalling $15,889.78, shall be deducted from plaintiff's computations.

The final area of dispute concerns $9,427.41 due for the winter season of 1980-1981, and $9,322.89 for the summer season of 1981. This lawsuit was filed in November, 1983, and defendant claims that

these seasons are not within the two-year limitation period prescribed in Title 29 U.S.C. Section 255. Plaintiff responds that defendant's violations were "willful", thus permitting application of the three-year statute of limitations. In McLaughlin v. Richland Shoe Company, 56 U.S.L.W. No. 44, p. 4433 (decided May 16, 1988), the United States Supreme Court defined willfulness under the FLSA as meaning that the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the FLSA. The Supreme Court rejected the Jiffy June standard previously applied in the Fifth Circuit, which merely required that an employer know that the FLSA was "in the picture." The Supreme Court rejected the Secretary's proposed standard that would permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a

completely good-faith but incorrect assumption that a pay plan complied with the FLSA.

In the case at bar, the basis for denying liability was defendant's belief that its stand operators were independent contractors, not employees. Even this Court initially shared this view. Defendant's rejection of the Secretary's argument to the contrary, was a good-faith but incorrect assumption. Therefore, this Court concludes that defendant's actions were not willful and that the two-year statute of limitations must be applied. The sum of $18,750.30, which represents the amount of wages due for the two seasons in dispute, shall also be deducted from plaintiff's computations.

It is so ORDERED.

SIGNED this 14th day of June, 1988.

s/ H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jun 14 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, *
Secretary of Labor, *
United States *
Department of Labor *
* SA-83-CA-2548
Plaintiff, *
vs. *
*
MR. W. FIREWORKS, INC. *
*
Defendant. *

JUDGMENT

In accordance with the Memorandum Opinion being entered contemporaneously herewith;

It is ORDERED that defendant Mr. W Fireworks, Inc. be, and it hereby is RESTRAINED from withholding minimum wage and overtime compensation from its employees in the amount of $225,423.61, plus interest from the date such wages became due at the rate provided by Title 26 U.S.C. Section 6621, until the date of

entry of judgment, plus post-judgment interest at the rate of 7.59% and plaintiff's costs of court.

It is further ORDERED that defendant Mr. W Fireworks, Inc. be, and it hereby is, RESTRAINED from refusing or failing to pay its employees minimum wage and overtime compensation as provided by law.

It is further ORDERED that defendant Mr. W Fireworks, Inc. be, and it hereby is, RESTRAINED from failing to make, keep and preserve records of any employees who work in its fireworks sales stands and of the wages, hours, and other conditions and practices of employment maintained by it.

SIGNED this 14th day of June, 1988.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

The foregoing documents constitute petitioner's appendix to its petition for a writ of certiorari. This page is included pursuant to Supreme Court Rules 14.2 and 33.6.

February, 1990

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No. 89-1307

In the Supreme Court of the United States

OCTOBER TERM, 1989

MR. W FIREWORKS, INC., PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioner's roadside fireworks stands are not "amusement or recreational establishment[s]" exempt from the Fair Labor Standards Act of 1938 under 29 U.S.C. 213(a)(3).

2. Whether the district court acted within its discretion in denying petitioner's motion to amend its answer to assert a new statutory exemption defense more than four years after the complaint was filed and seven months after the district court had considered and rejected petitioner's other exemption defenses.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Statutes, regulation and rules:

Miscellaneous:

Miscellaneous – Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1307

MR. W FIREWORKS, INC., PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 889 F.2d 543. The opinions, orders, and judgment of the district court (Pet. App. A21-A52) are unreported. A prior opinion of the court of appeals in this case is reported at 814 F.2d 1042, cert. denied, 484 U.S. 924 (1987).

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1989. The petition for a writ of certiorari was filed on February 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that owns and operates over one hundred roadside fireworks stands throughout

southern Texas (Pet. App. A2). Its business is seasonal because Texas law permits fireworks to be sold only for 11 days ending on the Fourth of July, and for 13 days ending on New Year's Eve (*id.* at A33; 814 F.2d at 1045). Petitioner's stands are located at scattered sites along public highways (Pet. App. A24). The stands are engaged solely in the retail sale of goods, primarily fireworks, for use by customers at locations "substantially removed from and functionally unrelated to" the stands themselves (*id.* at A9, A24). None of the stands is part of a larger recreational area, and none provides any amusement or recreational services (*id.* at A24).

2. The Secretary of Labor brought suit against petitioner in November 1983, alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* (Pet. 6; 814 F.2d at 1043). Petitioner's original answer, filed in December 1983, asserted that its stand operators are independent contractors not covered by the FLSA (R. 230-234). In May 1985, the district court allowed petitioner to amend its answer to claim two statutory exemptions, one for "outside salesm[e]n," 29 U.S.C. 213(a)(l), and a second for seasonal "amusement or recreational establishment[s]," 29 U.S.C. 213(a)(3) (R. 291, 325-326).

The district court, following a trial, issued an opinion holding that the fireworks stand operators are independent contractors and declining to reach the two exemption defenses (Pet. 7; 814 F.2d at 1055). In April 1987, the court of appeals reversed on the independent contractor question and remanded for consideration of the two asserted exemptions (814 F.2d 1042); this Court denied a petition for a writ of certiorari (484 U.S. 924 (1987)).

On remand, the district court rejected petitioner's argument that its fireworks stands are "amusement or recreational establishments" exempt from the wage and hour pro-

visions of the FLSA (Pet. App. A21-A24). The court, applying *Brennan* v. *Texas City Dike & Marina, Inc.*, 492 F.2d 1115, 1118 (5th Cir.), cert. denied, 419 U.S. 896 (1974), stated that the Section 213(a)(3) exemption "does not cover establishments whose sole or primary activity is selling goods, unless the enterprise is an integral part of a supervised, geographically delimited recreational area or establishment" (Pet. App. A23). The court found that petitioner's stand operators "exclusively engage in the sale of merchandise, primarily fireworks[,]" and that the stands "are located at various points on the side of a highway and are not part of any larger amusement area" (*id.* at A24).[1]

Seven months later, as the parties were preparing for a scheduled hearing on damages, petitioner filed a motion under Fed. R. Civ. P. 15(a) to amend its answer to assert, for the first time, that its fireworks stand operators are highly compensated "administrative personnel" exempt from the FLSA pursuant to 29 U.S.C. 213(a)(1) (Pet. App. A10-A11). The district court denied the motion as untimely, observing that the defense "could have been presented either before trial or at the time the other exemptions were addressed on remand" (*id.* at A29).[2] Following the damages hearing, petitioner again attempted to assert the administrative employee exemption, this time in a motion to amend its answer to conform to the evidence pursuant to Fed. R. Civ. P. 15(b) (Pet. App. A11). The district court

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[1] The district court also rejected petitioner's argument that its stand operators are outside salesmen within the meaning of the FLSA (Pet. App. A25-26). Petitioner abandoned that argument on appeal (*id.* at A4 n.1).

[2] The court added: "Defendant waited until discovery on the damages phase was completed and the case was set for trial before asking to amend. The liability phase is over and only damages remain to be determined" (Pet. App. A29-A30).

denied the motion "[f]or reasons previously expressed" (*id.* at A31). That same day, the court entered judgment for the Secretary, restraining petitioner from withholding compensation from its employees in the amount of some $225,000 plus interest, and permanently restraining future violations of the Act's minimum wage, overtime, and recordkeeping provisions (*id.* at A50-A51).

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings.[3] The court, relying on its earlier decision in *Brennan* v. *Texas City Dike & Marina, Inc.*, *supra*, affirmed the district court's holding that petitioner's fireworks stands are not an exempt amusement or recreational establishment (Pet. App. A9). The court explained that the legislative history of Section 213(a)(3) "suggest[s] the exemption was not intended to cover establishments whose sole or primary activity is selling goods," unless those sales are intended for consumption in a "geographically delimited recreational area," such as concessions at golf courses, baseball parks, amusement parks, racetracks, summer camps, and national parks (Pet. App. A7-A8 (citing 492 F.2d at 1118-1120)). Noting that petitioner conceded FLSA coverage of "the various other roadside stands common throughout Texas (*i.e.*, purveyors of fruit, vegetables, seafood, tamales, flags, bird houses, games, toys, portraits of Elvis on black velvet, etc.)," the court found nothing to distinguish petitioner's fireworks stands from "retailers of other seasonal and recreational items," and observed that petitioner's approach "would result in the exemptions swallowing the rule" (Pet. App. A8-A9).

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[3] The court reversed the back pay award and remanded for more detailed findings on how to credit so-called "cash advances" by which stand operators kept some cash receipts for themselves as an advance on their end-of-season commissions (see Pet. App. A13-A20).

The court of appeals further held that the district court did not abuse its discretion in denying petitioner's motions to amend its answer to assert the "administrative personnel" exemption of 29 U.S.C. 213(a)(1) (Pet. App. A10-A13). Regarding the Rule 15(a) motion, the court noted that petitioner waited more than seven months after the district court rejected its other exemption defenses before moving to amend, and that petitioner's motion "is simply an effort to try the matter of exemptions once more" (Pet. App. A10-A12). The court viewed petitioner's Rule 15(b) claim as "equally meritless," because the Secretary did not give actual consent to try the "administrative personnel" exemption, and no consent could be inferred from the Secretary's failure to object to evidence that was relevant to other issues at trial (Pet. App. A12). The court concluded that "[n]o good cause was established for the distinctly belated raising" of the administrative personnel exemption, and held that the district court did not abuse its discretion in denying petitioner leave to amend (*id.* at A13).

ARGUMENT

The court of appeals' resolution of the FLSA exemption issue is correct and does not conflict with any decision of this Court or any other court of appeals. The court of appeals also was correct in its fact-bound holding that the district court did not abuse its discretion in denying petitioner's motion to amend its answer.

1. This Court has said that "broad coverage is essential to accomplish [the FLSA's] goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency." *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985). Accordingly, the Court repeatedly has held that exemptions to the FLSA are to be narrowly construed and should not

be extended beyond "those plainly and unmistakably within [their] terms and spirit." *Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 35 (1987) (quoting *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945)). The employer bears the burden of proving entitlement to an exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 393, 394 n.11 (1960). The courts below correctly applied these principles in rejecting petitioner's attempt to expand the category of amusement and recreational establishments to include retailers of "recreational" goods.

a. Section 13(a)(3) of the Fair Labor Standards Act of 1938, 29 U.S.C. 213(a)(3), exempts from the Act's minimum wage and overtime requirements employees of "an amusement or recreational establishment[,] organized camp, or religious or non-profit educational conference center" operated on a seasonal basis.[4] Although the statute does not define "amusement or recreational establishment," the accompanying references to camps and conference centers indicate that Congress did not intend to create a broad ex-

[4] Section 13(a)(3) exempts from 29 U.S.C. 206 and 207:

> [A]ny employee employed by an establishment which is an amusement or recreational establishment[,] organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture.

29 U.S.C. 213(a)(3).

emption for sellers of "recreational" goods. Petitioner's position is further undermined by the existence of a separate statutory exemption for retailers, enacted at the same time as the original version of Section 13(a)(3), for employees of certain "retail or service establishment[s]" that make over half their sales in a single state and whose total sales do not exceed specified dollar limits. § 13(a)(2), 29 U.S.C. 213(a)(2). Congress plainly intended the exemption of Section 13(a)(2) to apply to retailers, but petitioner has never claimed to fall within its dollar limits.

The legislative history contains additional evidence that Congress intended to create only a limited exemption for parks and similar recreational facilities. The exemption originated in the 1961 amendments to the FLSA that first extended coverage to the retail sector. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 71. As the committee report explained, "[t]hese establishments are typically those operated by concessionaires at amusement parks and beaches and are in operation for 6 months or less a year." S. Rep. No. 145, 87th Cong., 1st Sess. 28 (1961). In 1966, Congress moved the exemption for amusement or recreational establishments to a new, separate Section 13(a)(3). Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 202, 80 Stat. 833. A House report on a similar provision stated that it "is intended to exempt from overtime requirements such seasonal recreational or amusement activities as amusement parks, carnivals, circuses, sports events, parimutuel racing, [and] sport boating or fishing * * *." H.R. Rep. No. 871, 89th Cong., 1st Sess. 35 (1965).[5] Senator Yarborough, the bill's floor manager,

[5] As noted by the Fifth Circuit in *Brennan* v. *Texas City Dike & Marina, Inc.*, 492 F.2d at 1118 n.8, H.R. Rep. No. 871, *supra*, discussed H.R. 10518, 89th Cong., 1st Sess. (1965), an unenacted bill. The committee's examples of exempt amusement activities are instructive,

in successfully opposing an amendment to extend the Section 13(a)(3) exemption to resort hotels, described the exemption as intended only "for amusement parks." 112 Cong. Rec. 20,791 (1966).[6]

The Court of Appeals for the Fifth Circuit carefully reviewed the statute and its legislative history and correctly concluded that Section 13(a)(3) does not confer a broad exemption on retail establishments whose "sole or primary function is the sale of recreational goods." *Brennan* v. *Texas City Dike & Marina, Inc.*, 492 F.2d at 1118. The court, drawing on opinion letters of the Department of Labor's Wage and Hour Administrator, concluded that the only retail sales enterprises entitled to an exemption under Section 13(a)(3) are those which are "an integral part of a supervised, geographically delimited recreational area." 492 F.2d at 1119 (footnote omitted). Applying those principles here, the court properly held that petitioner's roadside fireworks stands are not exempt. Because petitioner's sole activity is the sale of goods for use outside a defined recreational area, permitting it and similarly situated vendors to claim an exemption would indeed "result in the exemptions swallowing the rule." Pet. App. A8-A9.

b. Contrary to petitioner's assertions (Pet. 13-17), the decision of the court of appeals does not conflict with any other decision of a court of appeals. On the contrary, its

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however, because the following year the same Congress enacted into law language quite similar to that of H.R. 10518, *supra*. Compare 29 U.S.C. 213(a)(3) with H.R. Rep. No. 871, *supra*, at 35.

[6] The Secretary's interpretive regulations, first promulgated in 1970, 35 Fed. Reg. 5856 (1970), list as "[t]ypical examples" of amusement or recreational establishments "concessionaires at amusement parks and beaches." 29 C.F.R. 779.385 (citing legislative history). The Secretary's interpretive regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

decision follows directly from *Brennan* v. *Texas City Dike & Marina, Inc.*, *supra*, which held that a marina located on the Gulf of Mexico that "derived most of its income from boat, motor, and trailer sales" was not exempt from FLSA coverage (Pet. App. A6-A7). The other appellate decisions cited by petitioner address issues not presented by this case. This case does not involve the question whether an establishment not accessible to the general public, such as a country club, may qualify as an exempt "amusement or recreational establishment." See *Brock* v. *Louvers & Dampers, Inc.*, 817 F.2d 1255 (6th Cir. 1987). Nor is it pertinent to this case whether the Section 13(a)(3) exemption turns on the nature of the employer's business or the nature of the employee's work (see Pet. 16, comparing *Marshall* v. *New Hampshire Jockey Club, Inc.*, 562 F.2d 1323 (1st Cir. 1977), with *Brennan* v. *Six Flags Over Georgia, Ltd.*, 474 F.2d 18 (5th Cir.), cert. denied, 414 U.S. 827 (1973)). Here, the employer's business and the employee's work are one and the same — the retail sale of fireworks. Similarly, any potential conflict between an "income test" and a "primary activity" test (see Pet. 15) does not arise in this case, because the sale of fireworks is petitioner's primary activity as well as its primary source of income.[7]

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[7] The district court decision cited by petitioner (Pet. 13), *Donovan* v. *Fairfield Bay Community Club, Inc.*, 100 Lab. Cases (CCH) ¶ 34,511 (E.D. Ark. 1983), is entirely consistent with the holdings in this case and in the *Texas City* case. The marina at issue in the *Fairfield Bay* case was "an integral part of a 'supervised, geographically delimited recreational area,' " and derived only seven percent of its income from boat, motor, and trailer sales. *Id.* at 46,093-46,094. Similarly, the state court decision cited by petitioner (Pet. 13-14, citing *Webb* v. *Music City Serv., Inc.*, 85 Lab. Cases (CCH) ¶ 33,738 (Tenn. Ct. App. 1978)), is consistent with the court of appeals' ruling. *Webb* held that a bus service did not qualify as an amusement or recreational establishment because it did not operate wholly within a national park or other recrea-

2. Once a responsive pleading has been served, a party may amend a pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), this Court stated that a trial court is justified in denying leave to amend in instances of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Grant or denial of a motion to amend a pleading is reviewable only for abuse of discretion. *Ibid.*

The lower courts' refusal to permit amendment in this case is a fact-bound application of settled principles not meriting review by this Court. The district court, moreover, acted well within its discretion. Petitioner plainly was dilatory and delayed unduly in seeking leave to amend. Petitioner had access to all relevant facts about its own business operations from the outset of this litigation in 1983. The "administrative personnel" exemption is in the same subsection of the Act, 29 U.S.C. 213(a)(1), as the "outside salesman" exemption claimed by petitioner in its first amended answer in May 1985.[8] Petitioner nevertheless

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tional area, and because it provided transportation unconnected with tours or sight-seeing. *Id.* at 48,534-48,535.

[8] Section 13(a)(1) excludes from coverage under the FLSA:

> *[A]ny employee employed in a bona fide executive, administrative, or professional capacity* (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), *or in the capacity of outside salesman* (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative

waited to assert the new exemption defense until more than four years after the complaint was filed, almost ten months after the first court of appeals decision was issued, and seven months after the district court, on remand, had rejected its other exemption defenses. The court of appeals properly concluded that "[n]o good cause was established for the distinctly belated raising of the * * * [administrative employee] exemption claim," and that petitioner's motion was "simply an effort to try the matter of exemptions once more" (Pet. App. A12-A13). In such circumstances appellate courts regularly affirm the denial of motions for leave to amend pleadings. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 327 & n.1, 332 (1971); *Sandcrest Outpatient Servs.* v. *Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1148-1149 (4th Cir. 1988) (Powell, Cir. J.); *Federal Ins. Co.* v. *Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir. 1987); *Evans* v. *Syracuse City School Dist.*, 704 F.2d 44, 46-47 (2d Cir. 1983). This Court has looked with disfavor on motions to amend that belatedly raise new theories where, as here, the circumstances suggest that the moving party "knew exactly what it was doing in not presenting [the new] argument during trial and * * * realized a need to present [the new theory] only after it learned that its original arguments had not induced the court to hold in its favor." *Zenith Radio Corp.*, 401 U.S. at 332-333.

Petitioner incorrectly suggests that no "employee-oriented exemption" could be applicable until after this Court denied certiorari on the independent contractor issue in November 1987 (Pet. 27-28 n.4). The Federal Rules of Civil Procedure

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capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

29 U.S.C. 213(a)(1) (emphasis added).

expressly encourage parties to plead in the alternative by stating "as many separate claims or defenses as the party has regardless of consistency." Fed. R. Civ. P. 8(e)(2). Petitioner availed itself of the provision for alternative pleading by amending its complaint in 1985 to assert two "employee-oriented" exemptions, while simultaneously asserting that its stand operators were independent contractors rather than employees.[9]

Finally, petitioner is wrong in claiming that the courts below failed to state their reasons for denying the motion to amend (Pet. 24-27). Both the district court (Pet. App. A28-A30) and the court of appeals (*id.* at A10-A12) adequately explained their reasoning. The district court noted that the parties had been ordered to brief the exemption defenses in June 1987, that the court had ruled against petitioner on the exemption issues in July, and that "[s]ince that time, the parties have been preparing for the damage phase of the trial" (*id.* at A28-A29). The district court found that the new defense "could have been presented either before trial or at the time the other exemptions were addressed on remand" (*id.* at A29). The court of appeals affirmed because the "motion, pared to its fundamentals, is simply an effort to try the matter of exemptions once more" (*id.* at A12). Thus the reasoning of both courts satisfies the requirements of *Foman*, and petitioner's arguments to the contrary do not warrant review by this Court.

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[9] Petitioner does not seek review of the denial of its motion under Fed. R. Civ. P. 15(b) to amend its pleadings to conform to the evidence. The courts below properly refused to permit amendment under this rule because the administrative employee exemption issue was not tried by "express or implied consent" of the Secretary. See *ibid.*; Pet. App. A12-A13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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